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Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics

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COMMENTS

TITLE VII: AN ALTERNATIVE REMEDY FOR GENDER INEQUITY IN INTERCOLLEGIATE ATHLETICS

I. INTRODUCTION

The quest for gender equality in college athletics is a road that has been heavily traveled. For well over twenty-five years, women have pursued equal opportunities on the playing field.[1] The main avenue utilized in achieving that goal has been the application of Title IX of the Education Act of 1972[2] (hereinafter Title IX) to collegiate athletic programs.[3] While this legislation has allowed women to make great strides in their quest for athletic equality, which has frequently resulted in increased participation opportunities for women, it has not fully remedied the problem of gender inequity. Accordingly, while the use of Title IX has effectively increased opportunities for women and eliminated a portion of the existing gender bias, it has not eliminated all of the gender inequity present in collegiate athletic programs. As such, Title IX should not be the only available remedial option for female athletes facing discrimination.

Title VII of the Civil Rights Act of 1964[4] (hereinafter Title VII) protects individuals from employment discrimination on the basis of race, color, religion, sex and national origin.[5] If colleges and universities are defined as employers of the scholarship athlete, as they should be, protection under Title VII becomes available.[6] Accordingly, a female athlete who does not receive the same privileges of "employment" as a male

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1. Daniel Mahony & Donna Pastore, *Distributive Justice: An Examination of Participation Opportunities, Revenues and Expenses at NCAA Institutions 1973-1993*, 22 J. SPORT & SOC. ISSUES 127, 127 (1998).

2. 20 U.S.C. § 1681(a) (1994).

3. Mahony & Pastore, *supra* note 1, at 129.

4. 42 U.S.C. § 2000(e)(2) (1994).

5. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FILING A CHARGE OF JOB DISCRIMINATION (1999) [hereinafter EEOC].

6. Protection under Title VII is not predicated on being an employee; it is available to any individual. However, this comment will focus on disparate treatment females receive regarding fringe benefits of employment as college athletes. Accordingly, Title VII will be discussed in the context of an existing employer-employee relationship.

athlete should have the ability to file a discrimination claim using Title VII because her employment rights will have been violated.

Although, at first glance, Title IX seems an adequate remedy to the problem of gender discrimination in college athletics, it has not been completely effective thus far. As stated, Title IX has primarily been used to effectuate a positive change in the number of female participants in collegiate athletic programs. Title VII, however, can be effective in balancing the benefits received between male and female college athletes. Title VII provides a new avenue that can be taken in the pursuit of gender equity. When applied to college athletics, Title VII would undoubtedly rejuvenate the quest for gender equality; it would provide a new and useful method for achieving the goal.

This comment will primarily address the viability of a Title VII claim in the area of college athletics. First, however, the comment will discuss the impact of Title IX on college athletics thus far, and the disparate treatment female athletes continue to experience. Next, Title VII will be discussed, specifically the requirements for filing a Title VII claim. Emphasis will be placed on the idea that under Title VII, an employer-employee relationship exists between the scholarship athlete and the educational institution. Next, the benefits of using Title VII to remedy gender inequity in college athletics will be discussed. Finally, the comment addresses potential ramifications of applying Title VII to college athletics.

As stated by Robert Frost, at times taking the road less traveled is what makes all the difference.[7] By applying Title VII to college athletic programs, a world of difference can be made regarding gender inequity.

II. GENDER DISCRIMINATION IN COLLEGE ATHLETICS

A. History

Historically, female athletes have not dominated college athletic programs. In the late 1960s and early 1970s, opportunities for women interested in participating in college athletics were quite limited.[8] It is estimated that in 1969, only about 16,000 women competed in college athletics.[9] Although opportunities for women increased slightly, women still accounted for less than 20% of athletes at National Collegiate Ath-

7. ROBERT FROST, *The Road Not Taken, reprinted in* THREE BOOKS 119 (1916).

8. Daniel Mahony, *Collective Reaction to Injustice in Intercollegiate Athletics*, 23 J. SPORT & SOC. ISSUES 328, 329 (1999).

9. R. Vivian Acosta & Linda Jean Carpenter, *The Status of Women in Intercollegiate Athletics, in* WOMEN, SPORT AND CULTURE 111, 112 (Susan Birrell & Cheryl L. Cole eds., 1994).

letic Association (hereinafter NCAA) member institutions during the 1970s.[10] Additionally, female athletes did not receive financial assistance in the form of scholarships until the mid-1970s, and then only approximately ten thousand dollars per year was spent directly on college athletics for women.[11]

In contrast, opportunities for male athletes in the 1970s were numerous. In 1973, approximately 165,000 men competed at NCAA member institutions, accounting for more than 90% of participation.[12] Division I schools spent more than $1.5 million per year on male athletic programs.[13] It is clear by looking at this comparison that the "opportunities and resources spent on men's college sports were significantly larger than what was afforded the women."[14]

Although there was clearly disparate treatment of female athletes in the 1960s and 1970s, an analysis of more recent NCAA data indicates that change has occurred in the distribution of athletic resources at NCAA member schools.[15] In 1994, there were over 160,000 female college athletes.[16] As compared to 1973, women have approximately 57% more opportunities to participate at NCAA schools.[17] In addition, the amount of money used to fund women's collegiate athletics increased dramatically during the same period of time.[18] Although disparate treatment still exists, primarily in the area of benefits received by female athletes,[19] positive changes have occurred.[20] Participation opportunities have increased, and there has been a rise in the funding available to female athletic programs.[21] These changes are due, in large part, to the application of Title IX to college athletics.

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10. Mahony, *supra* note 8, at 332.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 332-33.
15. *Id.*
16. Acosta & Carpenter, *supra* note 9, at 112.
17. Mahony, *supra* note 8, at 330.
18. *Id.* at 331.
19. Felice Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does Not Exist*, 19 QUINNIPIAC L. REV. 67, 68 (2000).
20. Mahony, *supra* note 8, at 330.
21. *Id.* at 329.

1. Title IX Defined

Title IX "forbids discrimination on the basis of sex in any educational program or activity receiving federal funds."[22] In pertinent part, the statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance . . . ."[23]

Congress enacted Title IX in response to a finding of "pervasive discrimination against women with respect to educational opportunities."[24] Case law dictates that "Title IX was passed with two objectives in mind: to avoid the use of federal resources to support discriminatory practices, and to provide individual citizens effective protection against those practices."[25] Although the statute does not identify athletes directly, it had an immediate impact on collegiate athletic programs "because differences in opportunities and resources provided strong evidence of discrimination."[26] As interpreted by the courts, Title IX was "designed to remedy gender discrimination against the underrepresented athletes—either men or women."[27]

Those challenging Title IX identified its potentially disruptive effect immediately.[28] In 1984, those in opposition won a major battle. The court in *Grove City College v. Bell*[29] held that "Title IX applied only to those specific programs that received federal funds, and not to an entire institution."[30] This decision had a very limiting effect on the potential impact of Title IX "because the majority of college athletic departments did not receive direct federal aid."[31]

Fortunately for female athletes, the "program-specific approach" was rather short-lived.[32] In 1988, Congress passed the Civil Rights Restoration Act, which, in effect, "reestablished the institutional approach for Title IX."[33] This required all programs at educational institutions, in-

22. Timothy Davis, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 74 (1998).
23. 20 U.S.C. § 1681(a) (1994).
24. Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996).
25. *Id.* (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).
26. Mahony & Pastore, *supra* note 1, at 129.
27. Kelley v. Board of Trustees, 832 F. Supp. 237, 243 (D. Ill. 1993).
28. Mahony & Pastore, *supra* note 1, at 129.
29. 465 U.S. 555 (1984).
30. *Id.* at 573-74; Mahony & Pastore, *supra* note 1, at 129.
31. Mahony & Pastore, *supra* note 1, at 129.
32. *Id.*
33. *Id.*

cluding athletics, receiving federal funds to comply with Title IX.[34] This change led to widespread litigation concerning Title IX's effect on the inequities present in college athletics.[35]

2. Title IX Applied

While both men and women have filed cases alleging gender discrimination under Title IX, the majority of cases focus on the application of Title IX to remedy the disparate treatment that female athletes receive.[36] There can be no argument that, since its passage in 1972, women have used Title IX to their advantage. The opportunities for women to participate in college athletics, the funding for female programs, and the number of scholarships available for female athletes have all increased in the past twenty years.[37] However, while some feel "[t]here is little doubt that the passage and the threat of enforcement of Title IX resulted in a vast improvement in the sporting opportunities and resources available to girls and women in . . . institutions of higher education in the U. S.,"[38] Title IX's application to college athletics has not solved all problems stemming from gender inequity. "Despite Title IX's many victories over the last several years, equality for female athletes remains an unmet goal at most schools."[39] Gender inequality still runs rampant within college and university athletic programs.[40]

B. Present Discrimination

The previous section addressed the ways in which Title IX sparked positive change in the quest for gender equality in college athletics. At first glance, Title IX provided a more than adequate remedy for gender inequity. However, despite some improvement, gender equity in intercollegiate athletics has not been achieved.[41] While it is undisputed that

34. *Id.*

35. *Id.*

36. The application of Title IX to college athletics is quite detailed and complex; accordingly, an entire comment could be dedicated to the application of Title IX alone. However, because the primary focus of this comment is the proposed application of Title VII to college athletics, Title IX is only discussed in a general sense.

37. Mahony, *supra* note 8, at 329.

38. Annelies Knoppers, *Politics, Public Policy and Title IX*, *in* WOMEN, SPORT AND CULTURE, *supra* note 9, at 97, 103.

39. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 68 (1996).

40. Mahony & Pastore, *supra* note 1, at 139.

41. *Id.*

Title IX has been a catalyst for reform of college athletic programs, it has not eliminated the disparate treatment female athletes endure.[42] "In 1997, it was estimated that 80% to 90% of the athletic programs of . . . post-secondary educational institutions were not in compliance with Title IX."[43] Arguably, female athletes still face gender inequity. The gender inequity that continues to exist is best evidenced by examining the following five aspects of male and female athletic programs.

1. General Participation

In 1995, there was a national average of 8.35 college sports teams per university for men and 8.04 college sports teams per university for women.[44] On its face, that statistic seems to indicate that gender inequity, in terms of participation opportunities, is almost nonexistent. However, the previous statistic fails to indicate that the average number of male athletes participating in college athletics, per institution, was 245, while the average number of female athletes was only 143.[45] Further support that athletic participation levels are still disproportionate can be found by looking at, for example, the male/female athlete to student ratio at Louisiana State University (hereinafter LSU). Currently, the student population at LSU is 51% male and 49% female; however, the population participating in the athletic program is 71% male and 29% female.[46]

In addition to the previous statistics, a trend has developed amongst educational institutions that indicates the discrepancy that exists between male and female participation rates. To facilitate Title IX compliance, and ensure that the sports offered and participation opportunities provided for male and female athletes are comparable, many universities eliminate men's non-revenue sports teams, instead of increasing opportunities for women.[47] "This trend is likely to continue because the court held in *Kelley v. University of Illinois*[48] that using this strategy (eliminating men's opportunities while maintaining the same number of female opportunities) was a legally appropriate way to achieve Title IX compliance."[49] Male athletes have almost twice the number of participation

42. Mahony, *supra* note 8, at 329.
43. Duffy, *supra* note 19, at 68 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER EQUITY STUDY (1997)).
44. *Id.* at 92 (citing Brian Metzler & Carol Rowe, *Poor Sports*, BOULDER NEWS, Apr. 1997, at 4).
45. *Id.*
46. Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000).
47. Mahony & Pastore, *supra* note 1, at 139.
48. 832 F. Supp. at 237.
49. *Id.* at 244; Mahony & Pastore, *supra* note 1, at 142.

opportunities as female athletes.[50] Accordingly, educational institutions would rather decrease the male opportunities than increase female opportunities to equal the opportunities available to both sexes.[51] This remedy, while legally appropriate under Title IX, is not an effective solution. Moreover, it demonstrates the disparate treatment female athletes receive regarding participation opportunities.

2. Recruiting and Scholarships

"In 1992, twenty years after the enactment of Title IX, on average, less than 20% of recruiting funds went to women in college athletics, 25% of the total operating budgets went to women, and institutions allocated only 20% to 42% of athletic scholarships to women."[52] These percentages remain accurate today.[53] Overall, female athletes receive approximately $184 million less in athletic scholarships than do male athletes, and male athletes "have more than three times the financial resources in the areas of recruiting and operating expenses."[54]

A recent survey published by The Chronicle of Higher Education indicates that over one hundred colleges or universities currently allot a disproportionate percentage of their scholarship and recruiting budgets to female athletes.[55] For example, Miami University had a total scholarship budget of $3,215,937 as of June 2000.[56] Of that, $1,025,262, or 32%, was allotted to females.[57] However, 45% of the athletes at Miami University are females.[58] Accordingly, the budgetary allocation of scholarships for female athletes is disproportionate.[59]

In the area of recruiting budgets, as of June 2000, Miami University allotted $268,006, or 72% of its total recruiting budget to male teams, while only $103,887, or 28%, was allotted for recruiting female ath-

50. Duffy, *supra* note 19, at 92. The discrepancy between male and female participants is most likely attributable to college football programs. Admittedly, there is no female equivalent to men's football. Thus, the athletic opportunities for females at the college level are still considerably unequal to those of men.

51. Mahony & Pastore, *supra* note 1, at 139.

52. Duffy, *supra* note 19, at 92.

53. *Id.* at 68.

54. *Id.*

55. *Facts and Figures*, THE CHRON. OF HIGHER EDUC., at http://chronicle.com/search97cgi/s97_cgi, May 21, 1999 (last visited June 29, 2000).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

letes.[60] Clearly, Title IX has not effectively eliminated gender inequity in the area of recruiting and scholarships.

3. Operating Expenses: Travel Expenses and Per Diem Allowance; Equipment and Supplies

Analyzing operating expense budgets for intercollegiate athletic programs reveals that gender inequity is widespread. The Chronicle of Higher Education reported that over two hundred educational institutions spent less than half of their athletic operating expense budgets on female athletes.[61] While in some cases the numbers are only slightly disproportionate, there are examples of extreme inequity.[62] For example, at the University of Arizona, 75% of the operating expense budget is spent on male athletes, while only 25% is spent on female athletes.[63]

Additionally, when the overall operating expense budgets are broken down, and specific benefits are analyzed individually, evidence of gender inequity is again present. For example, although on a per capita basis travel expenses and per diem allowances for male and female athletes may appear equal, it can still be argued that the two genders are treated differently.[64]

> Department policies differ in terms of the number of people on a team, length of time on road trips, number of total road trips, and road trips that require overnights. Male teams traditionally have more overnight trips . . . and more overnight stays . . . The fact that women comprise only 36% of college athletes makes this practice discriminatory, despite equal individual allowances per trip, because universities spend only 36% of the budget on women's travel.[65]

Another area where discrimination is prevalent is the provision of equipment and supplies. Title IX does not mandate that budgetary allocation to each gender be exactly identical.[66] Rather, the legislation only requires that the equipment provided to both male and female teams be

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Duffy, *supra* note 19, at 95.
65. *Id.* (citing RICHARD TELANDER, FROM RED INK TO RED ROSES (1994); NATIONAL WOMEN'S LAW CENTER, TITLE IX AND MEN'S MINOR SPORTS: A FALSE CONFLICT (1997); Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.J. 5, 9 (1995)).
66. Bloom, *supra* note 65, at 14-15.

of the same quality.[67] Accordingly, it is acceptable that universities fail to provide women's programs that require expensive equipment (such as gymnastics and ice hockey),[68] yet still provide programs such as men's football (which requires a significant amount of equipment), as long as the quality of equipment that all athletes receive is the same.[69] A male program that requires expensive equipment will likely be implemented or maintained, whereas a female program requiring costly equipment will not.[70] This provides evidence of the preferential treatment that male athletic programs receive.

Additionally, it is important to note that most prominent men's teams are sponsored by equipment companies, and these teams receive equipment that is not factored into the universities' equipment budgets.[71] It is likely that even at universities that provide an equal equipment budget for both men's and women's teams, the women are still subject to an unequal distribution of equipment.[72]

4. Practice and Competitive Facilities

"Traditionally, men get more and better time on the practice and game fields."[73] University athletic directors often justify this practice by arguing that men's sports receive significantly more spectators, and produce more revenue, than do women's athletic events.[74] However, "it could be argued that . . . acceptance of college sports for women has been slow,"[75] because "the fact remains that athletic departments generally have not been successful at making women's sports into major revenue producers and profit making entities."[76]

If women's sporting contests are never given the "prime time" playing time, it is impossible to judge how many spectators would attend a given event, and how much revenue would be produced.[77] Accordingly, unequal use of facilities, for both practice and hosting athletic competitions, demonstrates another area in which female athletes face disparate treatment.

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67. *Id.*
68. Duffy, *supra* note 19, at 94.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 94.
73. *Id.* at 97.
74. *Id.*
75. Mahony & Pastore, *supra* note 1, at 131.
76. *Id.* at 133.
77. Duffy, *supra* note 19, at 97.

5. Publicity

"Disparity in coverage of male and female athletes by the athletic sports information departments is common."[78] To justify this, athletic directors use an argument similar to the one presented in the facilities context: women's sports do not generate public interest, and therefore, it is an inefficient use of resources to allocate funding and personnel to cover female athletic events.[79] "However, the sports information directors are actually in a position to affect these policies by conditioning releases of information about major men's sports on the publication of women's sports. Media coverage is . . . in the control of the department and should be considered when assessing gender equity."[80]

As evidenced by the preceding examples, it is obvious that despite some of the increases in opportunities for female athletes facilitated by the application of Title IX to college athletics, gender inequity is still present. "Most schools still offer more scholarships for male athletes and spend considerably more money on male sports."[81] Even though many "advances have been made in the past twenty-five years, women are still struggling to enforce the intent of Title IX, and proportionality at most schools is still a dream."[82] The former Advocacy Director for the Women's Sports Foundation, Kathryn Reith, believes that the quest for gender equality has become somewhat stagnant.[83] Reith has stated that "the process has stalled," and that "we are sort of stuck at [a] level of discrimination that [the educational institutions] are comfortable with."[84] One possible way to revitalize the movement for gender equality within college athletics is to use a new avenue to effectuate change. That avenue is Title VII.

III. Title VII as a Viable Remedy for Gender Discrimination in College Athletics

A. Objective of Title VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[85]

78. *Id.* at 98.
79. *Id.*
80. *Id.*
81. Mahony, *supra* note 8, at 329.
82. *Id.* at 329-330.
83. Susan Morse, *Women and Sports*, 2 Cong. Q. Researcher 195, 198 (1992).
84. *Id.*
85. EEOC, *supra* note 5.

Title VII provides, in material part: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[86] Under Title VII, it is illegal for an employer to discriminate in any area of employment, "including hiring, firing, promotion, layoff, compensation, *benefits*, job assignments, training . . . or any other terms of employment."[87]

Title VII was enacted by Congress "to achieve equality of employment opportunities."[88] In interpreting Title VII, "[c]ourts have prohibited both the disparate treatment of individuals and the use of policies that have a disparate impact on protected classes. Even those employment policies that are fair in form but discriminatory in operation have been declared unlawful."[89] Congress intended Title VII to offer comprehensive protections and, in short, eliminate discrimination in the workplace.[90]

B. The Elements of a Title VII Claim

There are two primary requirements necessary to sustain a Title VII claim. First, the individual bringing the claim must be a member of a protected class.[91] The classes which receive protection under Title VII are those based on sex, race, color, religion or national origin.[92] Second, the alleged discriminating party must be an employer covered under Title VII.[93] All private employers, state and local governments, and educational institutions that employ fifteen or more individuals are covered by Title VII.[94] Accordingly, a female scholarship athlete filing a claim

86. 42 U.S.C. § 2000(e)(2) (1994).

87. EEOC, *supra* note 5 (emphasis added).

88. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75 (1984) (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

89. *Id.*

90. Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2622-23 (1998).

91. 42 U.S.C. § 2000(e).

92. EEOC, *supra* note 5.

93. 42 U.S.C. § 2000(e).

94. *Id.* It should also be noted that the question of whether the defendant in a Title VII action is a covered employee is greatly debated. Employers will often claim that its workers are independent contractors and that the fifteen employee requirement is not met. *See* Ortner, *supra* note 89, at 2647. However, in any Title VII case brought against a college or university, it would be implausible to argue that the college or university did not have fifteen employees. Accordingly, that issue will not be addressed as part of this comment.

against her university under Title VII would have no difficulty meeting these two initial requirements.

In any action brought by a scholarship athlete under Title VII attempting to remedy the disparate treatment females receive with regard to privileges or fringe benefits of employment, the college or university would likely move for summary judgment.[95] In so doing, the college or university may claim that the relationship between the scholarship athlete and the educational institution is not one of employment, and therefore, not governed by Title VII.[96] The prospective plaintiff would have to show that a scholarship athlete is, in fact, an employee of his or her school and, therefore, Title VII is applicable.[97]

In the past, scholarship athletes have had difficulty convincing courts that they are employees for the purposes of Workers' Compensation Acts.[98] However, the policy of Title VII is different from that of work-

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95. Thomas Archer, *The Structure of a Title VII Action Against a College for the Enforcement of NCAA Proposition 48*, 2 SPORTS LAW. J. 111, 113 (1995).

96. *Id.*

97. *Id.*

98. Several cases have addressed the issue of whether an athletic scholarship is, in effect, an employment contract that creates an employer-employee relationship between the educational institution and the athlete. One of the first cases to address this question was *Van Horn v. Industrial Accident Commission,* 33 Cal. Rptr. 169 (Cal. Ct. App. 1963). Van Horn was a student athlete killed in a plane crash while traveling from an intercollegiate football game. After his death, his widow and minor children applied for death benefits, asserting that Van Horn was an employee of his university. The Industrial Accident Commission ("IAC") denied the award. Upon review, the *Van Horn* court held Van Horn had made a prima facie showing of an employment contract and remanded the case for further consideration by the IAC. The *Van Horn* court reasoned that because Van Horn's athletic prowess and membership on an athletic team were factors in his receipt of an athletic scholarship, the scholarship could constitute an employment contract. *Id.* at 169.

After *Van Horn*, the NCAA went on alert and began implementing language and policies that would lessen the resemblance between the athletic scholarship and an employment contract. ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 80-81(1998). In 1983, the NCAA received support for that principle with the decision of *Rensing v. Board of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

Rensing was an Indiana State University football player who was paralyzed during spring football practice. In denying his workers' compensation claim, the *Rensing* court held that intercollegiate sports are clearly distinguished from professional sports and that financial inducements in the form of scholarships and financial aid based on athletic ability cannot be considered an employment contract. SACK & STAUROWSKY, at 85.

After the *Rensing* decision, several other courts held that, in the context of workers' compensation, the athletic scholarship does not constitute an employment contract. Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983); Graczyk v. Workers' Comp. App. Bd., 229 Cal. Rptr. 494 (Cal. Ct. App. 1986); Townsend v. California, 237 Cal. Rptr. 146 (Cal. Ct. App. 1987). However, these cases all incorporate the specific principles of workers compensation law into the analysis of whether a scholarship athlete is a university employee. When

ers' compensation. The decisions in the context of workers' compensation focus on the definition of employee contained in workers' compensation statutes.[99] However, the definition of employee contained in Title VII is much broader than the definition contained in workers' compensation statutes.[100] Accordingly, the analysis of the courts under the workers' compensation framework does not apply to employer-employee questions in other legal contexts.[101] Scholarship athletes have a much stronger argument that the relationship between the educational institution and the scholarship athlete is one of employment when analyzed under Title VII.[102]

Perhaps the most effective argument a scholarship athlete could make is that the athlete's acceptance of a scholarship, in exchange for participation on an athletic team, is the formation of a contract between the educational institution and the athlete.[103] Such a conclusion is easily reached when the three basic elements of contract law are applied to the relationship between the scholarship athlete and the educational institution.

For a contract to exist, the elements of offer, acceptance, and consideration must be present.[104] In the context of college athletics, all three elements are easily satisfied. First, it is clear that when an educational institution recruits a scholarship athlete, the college or university is offering the athlete an opportunity to attempt to participate in an athletic

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analyzed in the context of Title VII, an entirely different conclusion must be reached. Under Title VII, a scholarship athlete would be an employee of the educational institution.

99. For example, the state of Wisconsin workers' compensation statute defines employees as "[e]very person in the service of another under any contract of hire, express or implied, all helpers and assistants of employers, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer . . . ." WIS. STAT. § 102.07(4)(a) (1999).

100. Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000(e) (1994).

101. Charlotte M. Rasche, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating College Athletes*, 16 REV. LITIG. 219, 235 (1997).

102. Archer, *supra* note 95, at 113.

103. Courts have recognized that contractual relationships are created by scholarship agreements. In *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972), the court determined that the agreement signed between the scholarship athlete and the university created a contractual relationship under which each party was required to fulfill their respective obligations. *Id.* at 382. Additionally, other courts have addressed the issue of a contractual relationship existing between a student and a university. Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); Ward v. Wash. State Univ. 695 P.2d 133 (Wash. Ct. App. 1985).

104. RESTATEMENT (SECOND) OF CONTRACTS §52 (1981).

program.[105] Second, the athlete demonstrates his or her acceptance of the educational institution's offer by signing the NCAA National Letter of Intent.[106] This letter contractually binds the athlete to compete at the respective university.[107] Finally, consideration is found in the scholarship itself.[108] Athletes receive varied benefits ranging from full tuition, room and board, to smaller benefits in the form of tuition reduction.[109] Regardless of the benefit, the element of consideration is met.

It is apparent that the colleges and universities intend for scholarship athletes to be contractually bound to the institution.[110] Colleges and universities recruit scholarship athletes for their superior athletic abilities. Stated differently, they are "hired for a specific purpose."[111] Scholarship athletes are required to sign letters of intent indicating the educational institution to which they are committing their services.[112] Moreover, scholarship athletes receive compensation. The procedure entailed in distributing the athletic scholarship is a valid basis for concluding that the scholarship athlete is indeed under contract as an employee of the educational institution.[113]

Still, courts have been reluctant to alter the dynamics of collegiate athletics by holding that such a contract creates an employee-employer relationship.[114] The existence of the contract has been recognized;[115] the employment relationship stemming from the contract has not.[116] Until courts are willing to accept that the athletic scholarship is an employment contract, it will be necessary for scholarship athletes to prove their

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105. David W. Woodburn, *College Athletes Should Be Entitled to Workers Compensation For Sports Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611, 630 (1995).

106. *Id.*

107. *Taylor*, 191 S.E.2d at 379.

108. Woodburn, *supra* note 105, at 631.

109. Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5(3) KAN. J.L. & PUB. POL'Y 137, 143 (1996).

110. *Id.* at 139.

111. *Id.* at 143.

112. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2000-01 NCAA DIVISION I MANUAL ART. 13.02.9 (2000) [hereinafter MANUAL]. The letter of intent is signed by the athlete after the recruitment process. It is analogous to the standard contract; the university makes the athlete an offer, the athlete accepts the offer by signing the letter of intent, and both parties then provide consideration, namely the educational institution providing the athlete the opportunity to participate and the athletes actual participation.

113. Riggs, *supra* note 109, at 143.

114. *Id.*

115. *Taylor*, 191 S.E.2d at 379.

116. Riggs, *supra* note 109, at 143.

employment status in accord with the methods traditionally used in the context of Title VII.

1. The Employer-Employee Relationship

The existence of an employer-employee relationship is one of the most debated elements of a Title VII claim. Title VII defines an employee as "an individual employed by an employer."[117] This language is quite ambiguous. Accordingly, the judiciary developed three tests used to determine whether an employer-employee relationship exists: (1) the common law test; (2) the economic realities test; and (3) the hybrid test.[118]

a. The Common Law Test

The common law test focuses on whether an employer had the right to control the details and means by which work was completed and the result accomplished by the work.[119] The Supreme Court has defined the test as the following:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; and the hired party's role in hiring and paying assistants . . . .[120]

Although this list is not determinative, it illustrates many factors the courts consider when using the common law test to determine if an employer-employee relationship exists.

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117. 42 U.S.C. § 2000(f) (1994).

118. Lewis L. Maltby & David C. Yamada, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 247-48 (1997).

119. *Id.* at 248.

120. Nationwide Mut. Ins. Co. v Darden, 503 U.S. 318, 323-24 (1992) (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1988)).

b. The Economic Realities Test

The economic realities test asks whether an individual is "economically dependent for his livelihood on the business to which the person performs a service."[121] There are five factors used to make that determination: (1) the extent of the employer's supervision and control over the worker; (2) responsibility and cost for orientation and equipment; (3) the length of job commitment and/or expectations; (4) the kind of occupation and skill required; and (5) the method of payment and benefits.[122]

c. The Hybrid Test

The test courts use most often is the hybrid test.[123] The factors usually considered by courts under the hybrid test are: (1) the type of occupation; (2) the skill required; (3) whether the individual or the employer furnishes the equipment with which the work is done; (4) the length of time the individual has worked; (5) the method of payment; (6) the manner in which the work relationship can be terminated; and (7) the intention of the parties.[124]

2. The Employer-Employee Relationship in the Context of College Athletics: The Athlete Control Test

When comparing the preceding three tests, it becomes evident that five factors are common to each test.[125] These same five factors also apply to the relationship between the educational institution and the scholarship athlete because they address the more fundamental aspects of the relationship. Accordingly, when determining whether a scholarship athlete is an employee of his or her university, a fourth test, which will be termed the "Athlete Control Test," should be applied.

The Athlete Control Test will analyze the following five factors: (1) the degree of control the university exercises over the scholarship athlete; (2) opportunities the scholarship athlete creates for an educational institution's profit or loss; (3) the university's investment in facilities used by the scholarship athlete; (4) permanency of the relationship be-

121. Kimberly Hayes, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Title VII, the ADEA and Other Labor Laws*, 44 BUFF. L. REV. 963, 986 (1996).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

tween the university and the scholarship athlete; and (5) the scholarship athlete's required skill.[126]

a. Degree of Control

The educational institution has a great degree of control over the scholarship athlete.[127] This is evidenced by the emphasis that is placed on athletics as opposed to other aspects of student life. During the playing season, most aspects of the athlete's life are dictated by the athletic program.

i. Athletics v. Academics

Some scholarship athletes are athletes first, and students second. Their first priority is the athletic program in which they participate. For example, at Creighton University, the athletic department encouraged a scholarship athlete to register for courses such as Marksmanship and Theory of Basketball, even though such courses did not count towards a university degree.[128] Additionally, the same scholarship athlete was provided with a secretary to read his assignments and prepare and type his papers.[129]

Unfortunately, this is just one of many examples where the scholarship athlete is expected to put his athletic responsibilities ahead of his academic responsibilities. Although instances such as the one described above are probably more prevalent at schools with larger athletic programs, it is plausible to assume that the academic integrity of athletes is compromised at almost every educational institution where a scholarship athlete is expected to make a positive contribution to his or her athletic team. Conduct by athletic departments similar to the conduct of Creighton University is evidence that a scholarship athlete's existence is controlled to a great degree by the educational institution.

ii. Athletics v. Work Study

In addition to fulfilling all of the athletic requirements mandated by the coach and the school, the scholarship athlete's life off the playing field is also controlled to a great degree.[130] For example, during both the academic semester and the summers between school years, scholarship

126. *Id.*
127. Riggs, *supra* note 109, at 144.
128. *Ross*, 957 F.2d at 412.
129. *Id.*
130. Riggs, *supra* note 109, at 144.

athletes' employment decisions are strictly regulated.[131] During the athletic season, student athletes are not allowed to hold full or part-time jobs.[132] During the off-season, a scholarship athlete must remit his or her earnings to the educational institution, and the earnings are then applied against the athlete's scholarship.[133] During the summer, when the scholarship athlete should be allowed a break from the confines of the scholarship agreement, the NCAA still controls the employment opportunities a scholarship athlete can accept.[134] Accordingly, even when a scholarship athlete is not at practice or playing in a game, his or her choices and decisions are limited.

b. Opportunities for Profit or Loss

"Although the concept of amateurism is firmly embedded in college athletics, college athletics has become big business."[135] This is evidenced by the $1 billion dollar television contract between Columbia Broadcasting System (hereinafter CBS) and the NCAA.[136] Additionally, Notre Dame University and National Broadcasting Company (hereinafter NBC) have a $38 million contract that grants NBC exclusive broadcasting rights for Notre Dame athletic contests.[137] These contracts, however, are not the only evidence of the money involved in college athletics.

In 1996, both Virginia Tech and the University of Texas earned $8.3 million by playing in the Sugar Bowl.[138] That same year, the University of Nebraska and the University of Florida each earned $8.8 million for playing in the Fiesta Bowl.[139] These figures seem outrageous; however, considering the increased involvement of corporate sponsors and television with intercollegiate athletics, they are not outlandish.[140]

When the contracts are considered together with the amount of revenue that colleges and universities generate from athletic programs each year, it is clear that there is a direct correlation between an educational institution's yearly profits or losses and the athletic program. The ath-

131. *Id.* at 139-40.
132. *Id.* at 139.
133. *Id.* at 139-40.
134. *Id.* at 140.
135. Rasche, *supra* note 101, at 220.
136. Woodburn, *supra* note 105, at 611.
137. *Id.*
138. Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer's Dream Come True,* 6 SETON HALL J. SPORT L. 167, 180 (1996).
139. *Id.*
140. *Id.*

letic program could not exist, and certainly could not produce a profit for the college or university, without the scholarship athletes. Therefore, the scholarship athlete has a substantial effect on the yearly profits of the college or university.

c. Facilities

The educational institution also controls the athletic facilities used by scholarship athletes. Educational institutions are the primary providers of facilities, equipment, and supplies for their athletic teams. Whether the athlete is participating in a practice session or playing in an athletic contest, he or she is undoubtedly using equipment and playing in a facility controlled by the college or university.

Additionally, as stated earlier, athletic departments exercise total control over scheduling and uniforms. Athletes have no control over which teams use which practice and playing facilities throughout the athletic season, or which equipment they practice with, or which uniforms they wear. The athletes have no control or decision making power with respect to equipment and facilities.

The lack of control over equipment and facilities is analogous to the traditional employer-employee relationship. In the conventional employment setting, employees perform their job responsibilities in facilities provided and regulated by the employer. Employees seldom create their own training and work schedules; that task belongs to the employer as well. Finally, employers typically require employees to wear a uniform or conform to a specific dress code. Just as the traditional employee is mandated by the employer's rules regarding facilities and equipment, so too is the scholarship athlete.

d. Permanency of Relationship

In the case of college athletics, the employer-employee relationship has the potential to last four years. While it is true that some athletes enter professional sports before completing four years of college, and the scholarship itself is only a one-year renewable agreement,[141] those facts do not change the overall average duration of the relationship. Many athletes participate in college athletic programs as scholarship athletes for at least four years. The duration of the relationship is controlled by the college or university.[142] According to the NCAA Manual, an athlete's scholarship can be terminated by the educational institution.

141. Riggs, *supra* note 109, at 144.
142. Ukeiley, *supra* note 138, at 190.

Section 15.3.4.1 of the NCAA Manual . . . expressly provides the university with this authority. The Manual states:

> Reduction and Cancellation Permitted. Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient:
>
> (a) Renders himself or herself ineligible for intercollegiate competition; or
>
> (b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement; or
>
> (c) Engages in serious misconduct warranting substantial disciplinary penalty; or
>
> (d) Voluntarily withdraws from a sport at any time for personal reasons; however, the recipient's financial aid may not be awarded to another student-athlete in the term in which the aid was reduced or cancelled.[143]

Accordingly, if a scholarship athlete engages in any activity that either results in a declaration of ineligibility, or is considered misconduct in the eyes of the educational institution, the athlete's scholarship may be reduced or canceled. Again, this situation is analogous to a traditional employee-employer relationship.

In the conventional employment setting, there are certain violations of an employment contract which, if committed by an employee, could result in the employee's termination. The same is true for the scholarship athlete. If an athlete were to engage in unlawful conduct, his or her scholarship could be withdrawn.[144] Just as in the traditional employment context, it is clear that the scholarship athlete does not control all aspects of the duration of the employment relationship.

e. Required Skill

Undoubtedly, college athletes must possess a high level of skill in their respective sports, enabling them to compete at the college level. Only the most skilled athletes receive scholarships. Accordingly, tremendous talent and highly specialized skill in a particular sport is a prerequisite for obtaining an athletic scholarship. Colleges and universities seek the most talented players, in hopes of creating a winning team, as demonstrated by the amount of time that colleges and universities spend on recruiting, practicing, and coaching college athletes.[145]

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143. MANUAL, *supra* note 112, at art. 15.3.4.1(a)-(d).
144. *Id.*
145. Archer, *supra* note 95, at 120.

Similar skill is required in the traditional employment context. Employers also seek and actively recruit employees with the most skill in hopes of creating a productive work force. Just as being skilled in a particular trade or profession is crucial to being hired by an employer, being skilled in a particular sport is a fundamental aspect of receiving an athletic scholarship.

Based on the preceding analysis and application of the proposed Athlete Control Test, it is appropriate to characterize the relationship between a scholarship athlete and an educational institution as that of an employer and employee. Scholarship athletes contract with the college or university and agree to provide a service in return for an economic benefit. Throughout the duration of the contract, a large majority of the athlete's athletic and non-athletic decisions are made for him or her. Scholarship athletes do not make their own choices; they are mandated to perform certain tasks at specific times. Just as an employee satisfies his or her job requirements in order to avoid termination, a scholarship athlete must fulfill his or her responsibilities to the educational institution in order to avoid losing his or her scholarship.

As demonstrated, the scholarship athlete can prove he or she is an employee of the educational institution. As such, the scholarship athlete can proceed with a Title VII claim against the college or university.

3. Necessary Elements of Proof for a Title VII Claim

There are two types of discrimination that have been recognized under Title VII: disparate treatment and disparate impact.[146] Disparate treatment is intentional discrimination based upon an individual's race, color, religion, sex, or national origin.[147] A claim of disparate treatment requires proof of a discriminatory motive.[148] Disparate impact is discrimination caused by a neutral employment policy that has a disproportionate impact on a class of protected persons.[149] A disparate impact claim does not require proof of a discriminatory motive.[150] Because a disparate treatment claim has the most viability in terms of the gender inequity present in college athletics, only this type of claim will be discussed in detail.

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146. GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 6 (1983).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

To prove intentional discrimination under Title VII, a female athlete would likely use the disparate treatment model. The disparate treatment model, first set forth in *McDonnell Douglas Corp. v. Green,*[151] and most clearly articulated in *Texas Department of Community Affairs v. Burdine,*[152] is used when an individual or several individuals are treated differently because of their race, color, sex, religion, or national origin. The disparate treatment model is useful because it sets forth an evidentiary framework to be followed by plaintiffs, defendants, and courts in cases involving alleged intentional discrimination for which there is no direct evidence.

If the plaintiff only has circumstantial evidence that the employer intentionally discriminates against employees, the plaintiff must proceed under the *McDonnell Douglas* burden-shifting analysis.[153] However, a plaintiff may also present direct evidence of discrimination, if it is available, to establish that an employer intentionally discriminated against employees.[154] Direct evidence and the disparate treatment model "are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent."[155]

The burden-shifting analysis in the disparate treatment model requires plaintiff to meet all elements of a three-part test. First, the plaintiff must prove a prima facie case of discrimination.[156] Second, the defendant must offer a legitimate nondiscriminatory reason for the discrimination.[157] Third, the plaintiff must demonstrate that the reason offered by the defendant is actually pretext for discrimination.[158]

A prima facie case of discrimination is proven when an individual shows that: (1) they belong to a protected class; (2) they have performed the job satisfactorily; (3) they have suffered an adverse employment action; and (4) the employer treated similarly situated employees more favorably.[159]

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151. 411 U.S. 792, 801-02 (1973).

152. 450 U.S. 248, 252-53 (1981).

153. *McDonnell Douglas Corp.,* 411 U.S. at 802. When using the disparate treatment model, the availability of direct evidence of disparate treatment shifts the burden of proof. *Id.* at 802. However, in most circumstances, the female athlete will not have direct evidence of discrimination. Accordingly, this comment will only address the use of the disparate treatment model with circumstantial evidence.

154. *Id.*

155. Blalock v. Metals Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985).

156. *McDonnell Douglas Corp.*, 411 U.S. at 802.

157. *Id.*

158. *Id.* at 804.

159. Davis v. McCormick, 898 F. Supp. 1275, 1286 (D. Ill. 1995) (citing Hughes v. Brown, 20 F.3d 745, 746 (7th Cir. 1994)).

Once the prima facie case of discrimination is established, the burden then shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for the disparate treatment.[160] The reason will be considered nondiscriminatory if it has its basis in anything not prohibited by Title VII.

After the employer has offered a nondiscriminatory reason for the adverse employment action, the plaintiff may challenge the offered reasons by showing that they are simply pretext for discrimination.[161] Pretext is defined as a false or weak reason or motive advanced to hide the actual or strong reason or motive.[162] It can be established by proving that: (1) the employer's explanation has no basis in fact; or (2) the employer's explanation was not the real reason; or (3) that the stated reason is insufficient to warrant the disparate treatment.[163]

4. Application to College Athletics

The preceding burden structure is seemingly ideal for the female scholarship athlete who, as an employee of her college or university, is subjected to disparate treatment resulting from the educational institution's policies and budgetary allotments within the athletic department. To further demonstrate the compatibility between a female athlete's discrimination claim and the use of Title VII, the preceding burden structures will be applied to the context of college athletics. The following analysis of the facts in *Pederson v. Louisiana State University*[164] will demonstrate how Title VII can be used to remedy an instance of discrimination at an educational institution.

LSU has offered competitive athletics for female athletes since 1977.[165] In the years following 1977, LSU had eight female athletic teams.[166] "In 1979, women's fast pitch softball was added, but was dropped following the 1982-83 season, with no credible reason given."[167] In 1995, LSU decided to add two intercollegiate varsity women's sports, fast pitch softball and soccer.[168] Soccer was scheduled to begin competitive conference play in the fall of 1995; competitive conference play for

160. *Id.*
161. *Id.*
162. BLACK'S LAW DICTIONARY 1187 (6th ed. 1990).
163. *Davis*, 898 F. Supp at 1286.
164. 213 F.3d 858 (5th Cir. 2000).
165. Pederson v. La. State Univ., 912 F. Supp 892, 901 (D. La. 1996).
166. *Id.*
167. *Id.*
168. *Id.*

softball was scheduled to begin in 1997.[169] However, in January 1996, neither the facilities nor the recruiting for either team was complete.[170] Additionally, although eleven scholarships were allocated for each team, only two partial softball scholarships had been awarded, and "less than the full compliment of soccer scholarships [had] been awarded."[171]

The plaintiffs in the case asserted a claim for unequal treatment of female athletes.[172] Included in the claim were assertions of "unequal pay to coaches, lesser quality facilities and other related grievances."[173]

Additionally, testimony in the case revealed that administrators at LSU had an "archaic" attitude towards female athletics.[174] In fact, the *Pederson* court found that LSU "persisted in a systematic, intentional, differential treatment of women."[175] The court stated that:

> LSU perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many . . . ways. For example, LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator," which the NCAA defines as the most senior women in the athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's teams at a rate far below that of its male coaches .... LSU arguably acted with deliberate indifference to the condition of its female athletics program.[176]

The facts and findings in *Pederson* illustrate that gender inequity was present at LSU, and that female athletes were subject to discrimination based on their sex.[177] Accordingly, a female scholarship athlete at LSU

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169. *Id.*

170. *Pederson*, 912 F. Supp at 902.

171. *Id.*

172. *Id.* at 904.

173. *Id.* It must be noted that the plaintiffs in *Pederson* were not varsity athletes. Rather, they were women who believed they would qualify to participate on either the soccer or softball team if said teams were implemented by LSU. Accordingly, the plaintiffs in *Pederson* would not likely meet the definition of employee, as discussed earlier in this paper, and therefore, they would not have been well served to proceed under Title VII. However, the facts of the case, and the discriminatory practices at LSU, could easily have been used as evidence of discrimination by a female scholarship athlete at LSU to prove a case of discrimination under Title VII. Accordingly, although the facts of the case have been set out as specific to the *Pederson* plaintiffs, they will be used to demonstrate how a Title VII claim would have been beneficial to an existing female scholarship athlete at LSU.

174. *Id.* at 881.

175. Pederson v. La. State Univ., 213 F.3d 858, 881 (5th Cir. 2000).

176. *Id.* at 881-82.

177. *Id.*

could have filed a suit under Title VII based on the legal theory articulated in this comment.

a. Application of the Disparate Treatment Model to the Facts of Pederson

Assuming that a female scholarship athlete at LSU proved her status as an employee of the university by use of the Athlete Control Test discussed earlier, she would undoubtedly be able to satisfy the necessary elements of proving a prima facie case of discrimination.

As stated earlier, a female scholarship athlete could establish her prima facie case of discrimination using either direct evidence or circumstantial evidence. Although it is possible that a plaintiff facing discrimination under the facts of *Pederson* would have direct evidence of discrimination, the following application of the disparate treatment model will assume that only circumstantial evidence is present.

First, as a female, the LSU scholarship athlete is a member of a protected class. Second, assume that the athlete is fulfilling her athletic responsibilities in a satisfactory manner. Third, the athlete suffered an adverse employment action (disparate treatment) as shown by the findings in *Pederson*. As stated, the court found that LSU intended to treat female athletes differently "on the basis of their sex by providing them unequal athletic opportunity."[178] Presumably, evidence of disparate treatment must have been present for the *Pederson* court to make such a determination. Fourth, the similarly situated male athletes receive far better treatment in terms of budgetary allotment, scholarships, and fringe benefits of participation in the college or university athletic program. This finding is also supported by the language of the *Pederson* court.[179]

The next step under the disparate treatment model is for the accused employer to offer a legitimate, non-discriminatory reason for the alleged discrimination. The court states that LSU had "not even attempted to offer a legitimate, nondiscriminatory explanation for the blatantly differential treatment of male and female athletes, and men's and women's athletics in general; they merely argue archaic values do not equate to intentional discrimination."[180] Although LSU did not offer a legitimate nondiscriminatory reason to defend the claim of a Title IX violation, they would be required to do so if defending a claim under Title VII.

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178. *Id.*
179. *Id.*
180. *Pederson*, 213 F.3d at 881.

While it is difficult to anticipate every counter argument that LSU, or any other educational institution, could offer, it is safe to assume that LSU would offer a nondiscriminatory reason that it believed to be legitimate, such as budget constraints or lack of interest in female athletics.

Finally, the female scholarship athlete at LSU would need to prove that this legitimate, nondiscriminatory reason offered by LSU was simply pretext for discrimination. The reasons potentially offered by LSU, or any other educational institution, are pre-textual. LSU intentionally denied female athletes the same privileges of employment received by men because female programs were not the money makers and generally did not bring the institution national recognition.[181] LSU acknowledged that it had "archaic" views concerning the female athletic program.[182] Accordingly, the *Pederson* court correctly held that LSU intended its discriminatory practices. The scholarship athlete would have successfully demonstrated pretext on the part of LSU.

As demonstrated, a female scholarship athlete at LSU could satisfy her evidentiary burden and show that discriminatory practices at LSU resulted in the disparate treatment toward female athletes. As stated, a disparate treatment analysis focuses on whether the accused employer had a discriminatory motive. The facts and findings in *Pederson* make it clear that a discriminatory motive existed. Based on the preceding application of the disparate treatment model to college athletics, it can be concluded that a female athlete subjected to disparate treatment or impact by her college or university should succeed with a Title VII claim and be afforded the available remedies.

5. Remedies Available Under Title VII

When there is a finding of employment discrimination under Title VII, several remedies exist, including hiring, reinstatement, reasonable accommodation, promotion, back pay, front pay, or *other actions that will make the wronged individual whole.*[183] The majority of these remedies are inapplicable to the employer-employee relationship created by the athletic scholarship. However, under Title VII, the court does have rather broad discretion in awarding remedies.

A court would be justified in ordering an educational institution to modify its current practices or to implement new policies to eliminate disparate treatment of female athletes. Such an award would not afford

181. *Id.*
182. *Id.*
183. EEOC, *supra* note 5 (emphasis added).

the specific plaintiff any direct monetary relief in the form of damages, front pay, or back pay (differing from most remedies given under Title VII); however, the nature of the relief would still be monetary and the female athlete would still benefit from the award.

For example, if a court ordered an educational institution to restructure its budgetary allocations so that men and women receive equal funding, the change would affect the economic structure of the college or university. Additionally, if an educational institution were ordered to provide new facilities or equipment for the female teams, those provisions would certainly be costly. Although the athletes would not personally receive damages for being treated disparately, the female athletes would still benefit from the relief awarded.

The obvious benefit from this type of relief award is twofold. First, awards that order educational institutions to implement new policies to remedy disparate treatment achieve the ultimate goal of balancing the resources available for male and female athletes. Second, the threat of forced economic restructuring may deter colleges and universities from promoting gender inequity in their athletic department practices.

Accordingly, the relief available under Title VII may serve to effectively eliminate the disparate treatment female athletes receive in their share of the benefits of participating in college athletic programs. Although Title IX is capable of providing female athletes with a similar remedy, the use of Title IX to effectuate such change has become stagnant. Title VII cannot offer any additional remedy when compared to Title IX, but the use of Title VII could plausibly be the catalyst needed to re-ignite the quest for gender equity.

V. Potential Ramifications of Applying Title VII to College Athletics

The successful application of Title VII to college athletics brings with it acceptance of the idea that a scholarship athlete is an employee of his or her educational institution. That finding would undoubtedly disrupt the current structure of the NCAA and college athletic programs. Although a distinction is made between the definition of employee under Title VII and other statutes, such as workers compensation, defining the scholarship athlete as an employee in any context would prompt scholarship athletes to file other claims for which a finding of an employment relationship is necessary. While it cannot be stated that athletes will succeed with claims other than Title VII, it certainly can be stated that the NCAA will encounter more lawsuits.

If Title VII were successfully applied to college athletics, the door would be open to a whole new host of litigation. However, that should not deter the use of Title VII in the context of college athletics. As evidenced by the earlier analysis of the *Pederson* case, Title VII has the potential to remedy many of the gender inequities that are present in college athletics. When Title IX was initially introduced, it too presented many potential ramifications for educational institutions, but it has, in many regards, helped female athletes in their quest for gender equality. If applied correctly, Title VII has the potential to be just as successful, if not more so, than Title IX, and effectively eliminate gender inequity in the area of athlete benefits in college athletic programs.

VI. CONCLUSION

Although it is impossible to assert with absolute certainty that the application of Title VII will fully remedy the gender equity problems that exist in college athletics, there is a viable argument that Title VII can accomplish what Title IX was intended to do, and yet has often failed to do. It is time to move past the stagnancy resulting from Title IX; it is time to apply Title VII to college athletic programs.

This comment focuses on the viability of Title VII as an additional resource female scholarship athletes can use to remedy gender inequity in college athletics. Title VII is not being offered as a substitute for Title IX. However, a new problem-solving method is needed if female athletes are going to achieve the gender equity they deserve.

The largest hurdle the scholarship athlete must overcome when attempting to use Title VII is the establishment of the employer-employee relationship between scholarship athletes and universities; however, this hurdle is not insurmountable.[184] When analyzed using the proposed Athlete Control Test, a scholarship athlete qualifies as an employee of the educational institution under Title VII. Accordingly, the scholarship athlete should be afforded the protections offered by Title VII.

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184. The ordinary athletic scholarship does indeed create an employer-employee relationship. For a variety of unarticulated reasons—foremost among them the fear of unchartered waters—it is not surprising that the courts have tended to refuse (under workers' compensation statutes) to hold that amateur athletes are really employees. It is an uncomfortable and unsettling realization that scholarship athletes are really employees, but it is a conclusion that an honest appraisal compels. And it is a conclusion from which a number of beneficial consequences will undoubtedly flow, contributing to the reform of a system much in need of constructive change.

Archer, *supra* note 95, at 117 (quoting RAY YASSER ET AL., SPORTS LAW CASES AND MATERIALS (3d ed. 1994)).

There is no question that female athletes have more opportunities and athletic privileges than twenty-five years ago. However, that fact should not serve as a barrier to a continued quest for equality. Female athletes are still subject to disparate treatment, and although Title VII has never been applied in this context before, it provides a new avenue to effectuate change. While both Title IX and Title VII exist as methods of eliminating gender inequality, it is often taking the road less traveled that makes all the difference.[185]

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185. FROST, *supra* note 7, at 119.